

THOMAS PASI
versus
WONDER MUSHURE
and
LINDA MADZIVAIDZE N.O. [*In her capacity as the Executrix Dative of the Estate Late Taurayi Madzivaide*]
and
LINDA MADZIVAIDZE
and
THE REGISTRAR OF DEEDS N.O.
and
MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE: 22 March 2016 & 10 February 2017

Opposed application

Ms A. Manuel, for the applicant
Mr T. Sibanda, for the first respondent
Mr P. Kwenda, for the second and third respondents
The fourth and fifth respondents in default

MAFUSIRE J: This was an application for the restoration of title over a certain immovable property that the applicant alleged he had been fraudulently dispossessed of. Respondents 1 to 3 [***the respondents***] opposed the application. But they had no case. At the end of the hearing I granted the substantive relief sought. Below are my reasons.

The applicant's case, in my own words, was this. In 1987 he bought a certain piece of land in Prospect, Harare [***the property***]. It was duly registered in his name under Deed of Transfer No 6132/87, dated 2 September 1987. All along he was keeping the deed in safe custody together with the diagram deed. However, in 2013 he woke up to find his property "gone". It was now jointly owned by respondents 2 and 3, husband and wife, under Deed of Transfer No 3241/2009, dated 5 August 2009. It transpired that respondents 2 and 3 had bought the property from the first respondent who had "owned" it under Deed of Transfer No 2451/2008, dated 21 August 2008.

Investigations revealed that someone had impersonated the applicant and had “sold” the property to the first respondent. Among other things, a fake special power of attorney, with a fake signature of the applicant, and a capital gains tax clearance certificate, also with a fake signature of the applicant, had been used to facilitate the “transfer” from the applicant to the first respondent. The crime was reported to the police. However, the thief was never caught.

The applicant brought vindicatory proceedings. He cited respondents 2 and 3 as the current holders of title. He also joined the first respondent as an interested party. He sought inter-related orders, namely, the restoration of his title deed no. 6132/87 aforesaid, and the simultaneous cancellation of the other two deeds, the one in favour of the first respondent [no. 2451/2008], and the other in favour of respondents 2 and 3 [no. 3241/2009].

The mainstay of the respondents’ defence was that their purchase and transfer of the property, at different times, had been above board because at every turn they had employed professionals in the form of estate agents [to conclude the sales] and conveyancers [to register the transfers]. The application was said to be fatally defective for the non-joinder of those professionals.

The respondents’ defence was moribund for a number of reasons.

That it was not their fault or that professionals had facilitated their purchase and transfer of the property could not possibly meet the applicant’s case. It is often the case that in situations of fraudulent transfers, such as was this, it is the innocent buyer that gets hurt. The loss falls on him. His claim to title is illusory because he got it from a thief.

If the applicant could prove that he never sold his property but that a thief did, then the respondents, *bona fide* as they might have been, could not have obtained valid title. A thief cannot pass valid title in the thing he has stolen. Concomitantly, a third part cannot acquire valid title from the thief. The position was put this way by MAKONI J in *The Trustees of the Lacrose Trust & Anor v Zimcor Trustees [Pvt] Ltd & Ors*¹, quoting the then 3rd ed. of SILBERBERG & SCHOEMAN’S *The Law of Property*, at p 75:

“A thief cannot acquire ownership or any other real right [except a *jus possessionis*] in the things which he had stolen and since nobody can acquire ownership in stolen goods, a third party can never acquire ownership / or other real right in property that has been obtained by fraud.”

¹ HH 348-13

The respondents flatly refused to recognise or accept that the proceedings before me were a *rei vindicatio*. They were mistaken. The law says the owner of a thing cannot be deprived of their property against their will. If they do, they are entitled to recover it from wherever found and from whomsoever may be holding it: see *Chetty v Naidoo*².

The non-joinder of the professionals was of no moment. It was not the applicant's business. They had merely facilitated the sales and the transfers. They had been mere agents. They had no interest in the property. They would have dropped out of the picture once their mandates had been completed. The applicant had nothing to do with any of them. Whatever story they might have, it was irrelevant to the applicant's cause. But if the respondents felt that the story might have been relevant, it was up to them to join such people to the proceedings. After all, r 87 [2] of Order 13 of the Rules of this Court permits the joinder, at any stage of the proceedings, of any person who ought to have been joined as a party, or whose presence before the court is necessary. The rule does not say only the applicant can do this.

Furthermore, and at any rate, sub-rule [1] of r 87 is clear. It says no cause or matter shall be defeated by reason of the joinder or nonjoinder of any party, and that the court may, in any cause or matter, determine the issues or questions in dispute so far as they affect the rights and interests of persons who are parties to the cause or matter.

The applicant's remedies lay chiefly against respondents 2 and 3 who held title to his property against his will. The first respondent was an interested party. It was him that purportedly took title from the applicant. It was him that purportedly passed it on to the other respondents. Clearly his presence before the court was necessary to explain where, how and from whom he had got that title, and how he had subsequently purported to pass it on.

The rest of the respondents, i.e. 4 and 5, were necessary nominal parties on account of their different statutory roles, the fourth respondent, the Registrar of Deeds, as the chief national custodian of all real rights in land; the fifth respondent, the Master of the High Court, as the overseer of all estate matters, given that the second respondent was an estate.

In his opposing affidavit, the first respondent did explain how he had bought the property via a firm of estate agents, and how he had subsequently transferred it. But none of what he said amounted to a defence. Among other things, it did not discount the applicant's story that a thief had "stolen" his property and had sold it to the first respondent.

² 1974 [3] SA 13 [A], at p 20B

That indeed a thief had “stolen” the applicant’s property and sold it was proved. Among other things, the applicant produced a copy of the original title deed that had no endorsement of the putative transfer. He also produced the prior deed of transfer, the diagram deed. He promised to produce the originals at the hearing. He never had to. The documents were not challenged.

The special power of attorney to pass transfer from the applicant to the respondent was plainly counterfeit. Contrary to the respondents’ lame protestations, the signature on it, purporting to be that of the applicant, was markedly different from his regular signature that he tendered and which was also very similar to the one on his founding affidavit.

The purported capital gains tax clearance certificate was also counterfeit. Among other things, the purported national registration number of the applicant thereon was incorrect, not just by one or two digits, but completely in all the digits, as well as the check letter. It had 80 – 066197 Z 42. The correct one on the applicant’s metal identity document card was 63 – 164977 H 50.

The respondents alleged that the applicant’s case was one huge attempted fraud to try and get back a property that he had purposefully sold away. However, that seemed a long shot. It did not accord with probabilities. The applicant still had the original title deed. He would have had to pass it on if he had legally transferred the property to the first respondent. Nobody ever said a duplicate original had had to be applied for, and had been obtained, as would have had been the case had the applicant lost the original. Furthermore, the applicant had gone on to report the fraud to the police when he had discovered it in 2013. The police had opened a docket which, among other things, contained the first respondent’s statement. The sum total of it all was that a fraud had been perpetrated on the applicant which had led to him losing title over his property.

Two other small issues raised by the respondents as grounds of opposition were that there was a dispute of fact that the court could not possibly resolve on the papers and that the applicant’s claim had become prescribed. Both were ill-conceived. There was no real dispute of fact. It was fanciful. I did not even have to adopt a robust approach.

Respondents 2 and 3 said in their opposing affidavit the applicant had been aware of their purchase of the property because they had spoken to him on the telephone in the year 2009. That skimpy and bald statement was all they said. The applicant denied it. All the respondents then latched onto that to argue that not only was there a dispute of fact that was

incapable of resolution on the papers, but also that the matter had become prescribed because the applicant had allegedly slept on his rights since 2009 [the application having been filed in 2015].

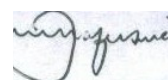
A party wanting to illustrate and rely on a dispute of fact must put forward cogent facts of his own version of events that must contrast with that of the other party. *In casu*, against all what the applicant had said to prove that he had never sold away his rights, the respondents just casually alleged that they had spoken to him on the telephone in 2009. About what? Why would they have been speaking to him? They were not taking transfer from him, but from the first respondent. It was all implausible. This was not the kind of factual basis to found a genuine dispute of fact or the defence of prescription.

The order that I granted at the close of argument read:

IT IS ORDERED THAT

- 1 Deed of Transfer No 6132/1987 dated 2nd September 1987 and registered in the name of Thomas Pasi, the Applicant, in respect of Stand 492 Prospect Township of Stand 106 of Prospect situate in the District of Salisbury and measuring four thousand one hundred and sixteen square metres [4 116m²] be and is hereby revived in terms of s 8[2][a] of the Deeds Registries Act, *Cap 20:05*;
- 2 The Registrar of Deeds, the fourth respondent herein, be and is hereby ordered and authorised to cancel and set aside the following title deeds and to make the appropriate endorsements on the relevant deeds and entries in the registers in terms of s 8[2][b] of the Deeds Registries Act, aforesaid:
 - 2.1 Deed of Transfer No 2451/2008 dated 21st August 2008 in respect of the property, purportedly transferred from Thomas Pasi and registered in the name of Wonder Mushure;
 - 2.2 Deed of Transfer No 3241/2009 dated 5th August 2009 in respect of the property, transferred from Wonder Mushure to Taurayi Madzivaizze and Linda Madzivaizze;
- 3 The first, second and third respondents shall pay the costs of this application.

10 February 2017

A handwritten signature in black ink, appearing to read "J. J. J. J.", written over a horizontal line.

Atherstone & Cook, applicant's legal practitioners

Chinawa Law Chambers, first respondent's legal practitioners

Kwenda & Associates, second and third respondents' legal practitioners